FOR ARGUMENT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, et al.,

Appellants,

v.

THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Appellees.

On Appeal From the United States District Court
for the District of Massachusetts

REPLY BRIEF OF THE APPELLEES COMMONWEALTH OF MASSACHUSETTS, et al.

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

Dwight Golann*
Steve Berenson
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

John P. Driscoll, Jr.
Edward P. Leibensperger
Neil P. Motenko
Special Assistant Attorneys
General
Nutter, McClennen & Fish
One International Place
Boston, Massachusetts 02110
(617) 439-2000

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I. INTRODUCTION.

The Secretary approaches this case as if it merely involved an administrative choice among three forms of imperfect technical data. Because, it is argued, the prior Secretary made a rational choice among the limited set of options he considered, the decision met the minimum standards of the Administrative Procedure Act. Appellants' Br. at 16. This argument carefully avoids the Secretary's complete failure to consider important alternatives to apportioning based on home of record. See infra at 14. It also fundamentally misconstrues the nature of this case.

A. The apportionment census is mandated by the United States Constitution. It is carried out under express provisions of the Apportionment Clause and the Fourteenth Amendment. Those provisions are mirrored in the language of 2 U.S.C. § 2a, which governs the actions of the Secretary at issue in this case. The Secretary has argued that she has an "unbridled breadth of delegation of authority," which may not be reviewed by any court, to conduct the apportionment count as she sees fit. Appellants' Br. at 21. This contention ignores, however, the Secretary's duty to implement the constitutional process, as well as the statutes that mandate how the decennial census must be conducted. As argued below, the Secretary's 1990 decision concerning apportionment counts is judicially reviewable and, on the facts of this case, illegal.

B. The Secretary also misstates the implications of this case for other census litigation, attempting to create a "Pandora's Box" of undesirable results. See Appellants' Br. at 25-26. But, while the apportionment census, which is all that is at issue here, is constitutionally mandated, the many other surveys and censuses conducted by the Department of Commerce, such as those which control the distribution of federal monies to states and localities, are creatures of statute. See 13 U.S.C. §§ 141(d) et seq. There is no required relationship between the conduct of the apportionment census and these discretionary census programs.

For example, Congress has mandated that the mid-decade census be conducted "without regard" to the statutory provisions governing the apportionment census, and has further stated that its results may not be used for reapportionment. See 13 U.S.C § 141(d). Similarly, in the only two instances in which the Secretary apportioned overseas employees back to states, 1970 and 1990, he did not include the overseas counts in the population totals for local government units, which are used to disburse local federal aid. A claim in 1970 that the Secretary was required to conduct discretionary censuses by the same rules as the constitutional one was properly rejected. See Borough of Bethel Park v. Stans, 449 F.2d 575, 581 (3rd Cir. 1971).

The Secretary also drew a distinction between apportionment counts and other census activities in 1990. Thus, when the

Commerce Department published the state-by-state 1990 Census results, it specifically distinguished between the "resident population" of each state (excluding overseas federal employees) and its "total" population (including those employees). See U.S. Dept. of Commerce Publication CB91-07 (January 7, 1991), Table 5.1/

A decision in favor of Massachusetts is also unlikely to provoke any wave of litigation over the apportionment of Congress. The reason is simple: no state has standing to sue unless it can prove that an illegal census policy caused the loss of its seat. In the 1990 reapportionment, Washington state was awarded the 435th and final seat. Massachusetts would have received the 436th seat apportioned, had one been available. The margin by which Massachusetts lost its eleventh seat was extremely narrow. See Congressional Research Service, House Apportionment Following The 1990 Census: Using the Official Counts 5 (Table 2) (February 4, 1991) (hereinafter "House Apportionment"). It is precisely because Massachusetts lost this final seat by such a razor-thin margin that it has standing to contest the Secretary's decision. Given the narrow

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1/ In other departmental publications concerning the 1990 results, the total population listed for each state is also higher than the sum total of the populations of each governmental unit in the state, because the Secretary chose not to include overseas employees in local census counts. See "Summary Population and Housing Characteristics," U.S. Dept. of Commerce Publ. 1990 CPH-1-49. This practice is entirely legal.

margin, the difference between the overseas employees apportioned to Massachusetts and Washington[2/] was crucial. Other states, however, would have to increase their relative populations by much larger margins in order to qualify for the last seat apportioned. This explains why only Massachusetts and Washington, out of all the states, were affected in terms of their congressional representation by the Secretary's 1990 decision concerning overseas employees. It is also why, as a practical matter, only the few states closest to qualifying for the last seat awarded in any apportionment are likely to have standing to sue. And, given the deference shown by federal courts in census cases, even those few states are unlikely to identify any viable legal claim. For these reasons, no "Pandora's Box" will be opened if the lower court's decision is affirmed.

C. The Secretary has again argued that the lower court's order "throws out" 922,810 persons from the census. Appellants' Br. at I. And amicus Washington claims that the decision below in some way interferes with overseas employees' voting rights. Washington Amicus Br. at 22. These claims, too, are either overstated or simply untrue.

2/ Washington has stated correctly that 21,249 overseas employees were apportioned to Washington in 1990. Washington Amicus Br. at 3. Only 12,626 overseas employees were apportioned to Massachusetts. Compare House Apportionment at 5 (Table 2 - state population counts including overseas employees) with id. at 8 (Table 3 - state population counts excluding overseas employees).

The lower court's Final Decrees and Orders did not, in fact, "throw" anyone out of any count, but simply required the Secretary to restate how many seats in Congress the states were entitled to if overseas employees were not apportioned. J.S. App. 83a (Slip Op.); 95a (Final Decrees). As the parties stipulated, this means that Massachusetts and Washington would retain the same number of seats in Congress as they had during the 1980s.

Overseas Americans would in fact be counted in the 1990 Census under the lower court's orders -- as Americans. It is true that they would not be apportioned to particular states where, the parties agree, they were not residing in 1990. In this respect, however, the census' treatment of overseas employees is no different from the way that all residents of the District of Columbia, Guam, and other U.S. territories are counted. In 1990 and prior censuses, the Secretary counted these persons as Americans, but did not apportion them to "home" states where they were not living. J.A. 206. Also, the Secretary has never apportioned members of domestic military to their "home states," instead, they have always been counted at the places they were posted and living on the census date. Stip. 10 (J.A. 175).

Similarly, the lower court's orders do not interfere with the voting rights of overseas residents. The Constitution makes no connection between the apportionment census and

numbers of voters. See Appellees' Brief at 62-63. The absentee voting statute permits Americans abroad to vote on a basis quite different from the "home of record" that a serviceman may have declared years earlier. See, e.g., 42 U.S.C. § 1973ff-6(5) (requiring some absentee voters to register at "the last place the person was domiciled in before leaving the United States"). The Secretary's 1990 decision to apportion overseas employees thus had a bizarre effect on voting rights: some overseas employees were undoubtedly apportioned to increase the representation of states different from the ones in which they had elected to vote.

II. THE SECRETARY'S ACTION WAS ILLEGAL.

The Secretary misunderstands Massachusetts' argument as to why the 1990 decision to apportion employees to states based on "home of record" file data was illegal. The home of record data used by the Secretary was not an "enumeration," was not accurate, and did not reflect current place of inhabitance. Those defects, which were identified by the Census Bureau but were never meaningfully addressed by the Secretary, go to the heart of the concept of a "census." As a result, they violate both the Constitution and the statutes which govern the Secretary's actions in this case.

The Constitution places three express constraints on the census process: First, the census must be done through an

"actual Enumeration." Second, the population must be recounted "within every . . . Term of ten years . . . ." U.S. Const. art. I, § 2, cl. 3. Third, reapportionment must be based on the "whole number of persons," that is "inhabitants," who are "in each State." U.S. Const. amend. XIV, § 2.

The statutes governing the apportionment census mirror the language of the Constitution. They require the Secretary to prepare a "statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census . . . ," see 2 U.S.C. § 2a, and to conduct a census every ten years. 13 U.S.C. § 141(a). Any constitutional violation would thus also constitute illegal conduct under these statutes.

"The decennial census is a headcount rather than an estimation based on sampling." Tucker v. United States Department of Commerce, No. 91-2051 (7th Cir. March 16, 1992) at Lexis p. 3, citing Carey v. Klutznick, 508 F. Supp. 420, 422-24 (S.D.N.Y.), aff'd, 637 F.2d 834 (2d Cir. 1980). Since 1790, the apportionment census has been conducted through an actual enumeration of the population, rather than a sampling. Census takers have either visited or, more recently, have mailed questionaires to each household in America. If inhabitants do not respond, "census takers must visit them personally." Id.

The Secretary's initial decision to apportion overseas employees was based on the Defense Department's ("DOD") promise to do an enumeration. That promise, however, was revoked. J.S. App. 76a. The Census Bureau did enumerate the entire domestic population of the United States, consisting of more than 248,000,000 inhabitants, but there was no enumeration of overseas military employees in 1990. Instead, as the Secretary describes at length in her brief, the 1990 Census relied solely on outdated statistical file data to apportion the vast majority of overseas employees.[3/] This failure to enumerate violated an express requirement of the Apportionment Clause and, as argued infra at 15, constituted an unexplained and unjustified departure from the Secretary's historic practice.

Second, the Constitution requires that the census be conducted on a decennial basis; that is, there must be a recount of the population "within every subsequent Term of ten Years." U.S. Const. art. I, § 2, cl. 3. See also 13 U.S.C. § 141(a). The Framers' intent in inserting this requirement is clear: they meant to guarantee that reapportionment decisions

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3/ The Census did attempt an enumeration of approximately 60,000 DOD civilian employees for whom there was no home of record data. There was only a 20 per cent response rate to this survey, however, and the census did not follow up on nonrespondents, as it did for the domestic population. Stips. 54, 57 (J.A. 185-87); J.S. App. 87a. As a result, of 901,880 overseas military employees apportioned in 1990, all except roughly 12,000 (20% of the civilian employees) were apportioned without a constitutional enumeration.

would be based on current population figures reflecting the nation's rapid demographic changes, rather than on outdated records that showed only the location of population years in the past. The Federalist No. 58. Without a current census showing the present distribution of the nation's inhabitants, neutral formulas could be applied, but Congress would nevertheless be malapportioned. See Wesberry v. Sanders, 376 U.S. 1, 14 (1964) (noting the Framers' concerns about replication of the English phenomenon of "rotten boroughs").

In 1990, the Secretary decided not to conduct a census of where the overseas population currently resided, but rather to rely on "home of record" data, which employees had designated when they first entered military service. Under DOD rules, military employees are prohibited from changing their home of record, even if their home state changes, until they are discharged or break service. J.A. 147 n.5. As the Defense Department stated to Congress in late 1989, home of record "may also be a place where the person has not lived for many years . . . ." J.A. 124 (emphasis added). The district court made the same factual finding. J.S. App. 76a-77a. Thus, in 1990 the vast majority of overseas employees were apportioned to states on the basis of the states they had listed on the dates they first entered military service, years or even decades in the past.

In her brief, the Secretary attempts to make a positive point of this failing, arguing that home of record "has the considerable virtue of 'remaining constant' in the face of the service member's often rapid mobility." Appellants' Br. at 42. This argument is, however, impermissible in the face of the clear and purposeful directive of the Constitution. By requiring that the census be repeated every ten years, the Framers intended to insure that reapportionment decisions take account of the "rapid mobility" of the American population, not deny its existence. For the Census Bureau to apportion nearly 900,000 military overseas employees in 1990 based on home of record data that was often "many years" old (or was never accurate in the first place) directly violates the constitutional command to enumerate on a decennial basis.

Finally, the Fourteenth Amendment requires that apportionment decisions be based solely on the "whole number of persons" or "inhabitants" found "in each State." The legislative history of the Fourteenth Amendment, and the use of the word "inhabitants" interchangeably with "persons," demonstrates that the drafters of the Fourteenth Amendment intended to reinforce the intent of the original Apportionment Clause, see Wesberry, 376 U.S. at 13, which was that representation would be based solely on the number of persons who were inhabiting each state on the census date. Appellees' Br. at 34.

The Secretary attempts to avoid this requirement by claiming that Massachusetts argues that only those persons who are physically present in a state on the census date can be apportioned to it. Appellants' Br. at 36. This is not Massachusetts' argument. See Appellees' Br. at 56-59. As noted in our primary brief, the "usual residence rule" has always allowed inhabitants who are "occasionally absent" from their homes to be included in apportionment counts. Id. at 8. The Secretary now argues that this sensible qualification, designed to allow persons who are on a journey on the census date to be counted at the place they actually inhabit, means that the constitutional criterion places absolutely "no limitation on the duration of the [person's] absence . . . ." Appellants' Br. at 35.

The problem with the Secretary's argument is that it confuses the issue of the duration of journeys, which in the era of horse and sail were lengthy, with the issue of whether the traveler simply occupied temporary lodgings while doing business and maintained his permanent home in a state, or established a new home or dwelling at his destination. In the former case, he was merely a traveler on a long journey, while in the latter, he became an "inhabitant" of the out-of-state location.4/

4/ Thus, Dr. Johnson's Dictionary defined "inhabitant" as "Dweller; one that lives or resides in a place." S. Johnson, A Dictionary of the English Language (W. Strahan ed.: London,

(footnote continued)

Overseas federal employees, who are stationed abroad for years and do not maintain a home in any state, are not "occasional travelers," but rather establish "dwellings" and "live" at their overseas posts. Indeed, the parties have stipulated in this case that the "usual residence of overseas employees is their overseas post." Stip. 8. (J.A. 174).

Of course, none of the Secretary's arguments about the meaning of "occasionally absent" answers the basic problem with apportioning based on home of record data: the fact that the file information did not even necessarily describe what state overseas employees had inhabited prior to 1990. As the DOD noted, home of record data may show a place where the employee "has never lived." J.A. 124. Using on these misleading and irrational criteria does not meet the constitutional requirement that apportionment be based "solely on the number of inhabitants of each state." See Wesberry, 376 U.S. at 13.

The Secretary has cited in defense of this practice a letter written in 1969 by then-Assistant Attorney General William Rehnquist. While the letter did conclude that the

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(footnote continued)

1755). The Official Instructions used in the 1990 census replicate Dr. Johnson's definition almost perfectly, stating that "[t]he 1990 census must count every person at . . . the place where the person lives and sleeps most of the time." J.A. 233.

Secretary had discretion to apportion overseas employees, it should be noted that it did not purport to analyze the constitutional provisions that regulate the census. Instead, the Assistant Attorney General relied on an earlier formal opinion of the Attorney General. See J.A. 47, citing 41 Op. Att'y Gen. 31 (1949). The 1949 Opinion simply assumes without analysis that Americans who are living overseas remain inhabitants of the United States, id. at 32, and confirms the Secretary's discretion to follow the consistent practice of not apportioning them back to states. Id. at 34.

When the Justice Department did review the legislative history of the Fourteenth Amendment in 1988, it concluded that "throughout the debates on section 2 of the Fourteenth Amendment, there seems to be a premise that the census would count inhabitants of the United States and not individuals who did not reside in one of the states. Accordingly, we entertain serious doubts as to the constitutionality" of apportioning overseas federal employees to states. J.A. 241.

The Secretary's 1990 decision to apportion overseas employees to states based on file data that was often inaccurate or many years out of date, and to assign them to states of which they were admittedly not current inhabitants, thus violated the express terms of the Constitution and governing census statutes.

III. THE SECRETARY'S UNEXPLAINED FAILURE TO CONSIDER ALTERNATIVES TO THE USE OF OBSOLETE AND INACCURATE FILE DATA WAS ARBITRARY AND CAPRICIOUS.

The Secretary characterizes the choices faced by Secretary Mosbacher in the wake of the DOD's cancellation of its planned enumeration as a limited technical choice between three available types of file data. Appellants' Br. at 41. But this Court should find the prior Secretary's actions improper for the additional and independent reason that he completely failed to consider any alternatives to the use of obsolete and inaccurate file data. In particular, the Secretary refused to consider an important alternative available to him: returning to the historic census practice of counting overseas employees as part of the overall American population, but not apportioning them to states. Secretary Mosbacher's complete failure to consider that important option, J.S. App. 79a, rendered his decision arbitrary and capricious under the standard set forth in both the majority and concurring opinions in Motor Vehicle Manufacturers Association, Inc. v. State Farm Insurance Co., 463 U.S. 29, 43 and 58 (Rehnquist, J., concurring) (1983).

The Secretary attempts in her brief to minimize the significance of the DOD's promise to conduct an actual enumeration of overseas employees. She suggests that it was the timing of the information that the enumeration was expected

to produce, rather than its quality and substance, that was significant to Secretary Mosbacher's decision to apportion. Appellants' Br. at 44-45. But enumeration is a constitutional requirement for the apportionment census, not simply a desirable option. Moreover, a review of the administrative record as a whole shows the Secretary's characterization to be inaccurate.[5/]

Given, moreover, that for two decades the defendants opposed apportionment of overseas employees largely because they had concluded (on the basis of their 1970 experience) that DOD's file data was not reliable, see J.A. 55, 61, 79, 106, 112; A.R. 37, 43, 83, 224, 271, the Secretary's decision to reverse policy and rely on file data can only be deemed reasonable to the extent it addressed the agency's prior concerns about that data. Motor Vehicles Manufacturers Association, Inc., 463 U.S. at 43. As noted, the only aspect of the Secretary's decision memoranda that in any way dealt with the Census Bureau's conclusion that home of record file data was inadequate, was the DOD's promise to conduct an enumeration. J.S. App. 66a.

5/ The lower court made a factual finding that DOD's promise to do an enumeration was key to the Secretary's decision to apportion. J.S. App. 76a. This Court need not reassess the district court's factual findings. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490-91 (1951). But if it chooses to do so, a review of the record will show that the Secretary's statement about timing refers to his expectation that the DOD's actual enumeration, a much more complex undertaking than a mere review of file data, would be completed in time to be incorporated into the 1990 apportionment counts.

The Secretary attempts to demonstrate a reasoned basis for the decision to apportion based on home of record by citing conclusory statements that appear in the Administrative Record from July 1990. The lower court found that these brief conclusions were contradicted by the facts contained in the record as a whole, and were therefore nothing more than justifications for a decision that was based on a prior "commitment" to certain members of Congress, rather than a reasoned analysis. See J.S. App. 78a-79a.[6/] More importantly, the documents which the Secretary cites in defense of the decision to apportion do not show any consideration of the option of returning to the historic, constitutionally grounded practice of not apportioning overseas employees.

The Secretary also argues that home of record data may have been more favorable to Massachusetts than the other two forms of file data which the Secretary considered. Appellants' Br. at 41 n.29. Even if true, this is irrelevant, since

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6/ Thus, for example, in a two-sentence memorandum dated July 13, 1990, three and one-half months after the census date, the Associate Director for the Census stated, without providing any reasoning or underlying support, that "the technical staff of the Census Bureau believes that the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DOD has available." J.A. 164. However, as recently as May 17, 1990, a similar policy memorandum had stated that "'[h]ome of record' does not necessarily satisfy a reasonable concept of 'usual residence.'" J.A. 131. And a 1990 Congressional Research Service study cited by the Secretary concluded that of the three data elements contained in DOD files, last duty station, and not home of record, most closely resembles the concept of usual residence. J.A. 152.

Massachusetts has argued that file data should not have been used for apportionment at all. Moreover, the discrepancy between the distribution of this data between Washington and Massachusetts and the distribution of the actual resident populations of the two states was more than enough to cause Massachusetts to lose its eleventh congressional seat. Also, the fact that other file data was even worse does not excuse the Secretary's failure to consider the option of not using file data at all.

IV. THE SECRETARY'S DECISION TO APPORTION OVERSEAS EMPLOYEES IS SUBJECT TO LIMITED JUDICIAL REVIEW AS AN EXERCISE OF HER DISCRETION UNDER THE APPORTIONMENT STATUTE.

There is no question that Massachusetts' constitutional claims are judicially reviewable. Webster v. Doe, 486 U.S. 592, 603 (1988). But the Secretary argues that her predecessor's violations of the the apportionment and census statutes, and the failure to consider alternatives, are not.

A. The Secretary's Decision Is Not Committed To Agency Discretion By Law.

In arguing that Secretary Mosbacher's decision to apportion overseas employees is committed to agency discretion by law, the Secretary asks the Court to look solely at 13 U.S.C. § 141(a)'s provision that the Secretary conduct the census "in such form and content as he may determine." Appellants' Br. at

19. As the lower court noted, however, the actions at issue in this case were also taken pursuant to 2 U.S.C. § 2a, which provides clear "law to apply" in this case. J.S. App. 70a. That section, mirroring the language of the Constitution, requires the Secretary to prepare a "statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census . . . ." Title 13 U.S.C. § 141(a) also requires that a census be conducted every ten years. Thus, the Secretary's discretion to conduct the census is restricted at the least by the requirements that she conduct an actual census that shows the number of persons in each state, and do so anew every ten years. This provides a meaningful standard against which to evaluate the actions of the Secretary in this case.

The defendants have also acknowledged that the usual residence rule has been the "guiding principle" for apportionment decision for two hundred years. Appellants' Br. at 3. Although the Secretary argues that there has been some variation in how that standard has been applied, id. at 20, even if true, this would not disqualify the rule from providing an adequate standard for judicial review. First, except in 1970, the rule had been applied without variation to overseas military personnel beginning in 1830, to require that they not

be apportioned back to states.[7] Second, in all of the instances in which the Secretary argues that the usual residence rule has been "modified" over time, the groups of persons involved had two separate places where they lived during any single year. Such situations present the question (not present in this case) as to which of two simultaneous residences is the more "usual" one. For example, college and boarding school students maintain residences during any year both at school and their parents' homes. Members of Congress maintain residences both near Washington, D.C. and in their home districts. And seafarers maintain berths or beds both on land and on their ships.

The application of the usual residence rule to subgroups of the population with more than one residence presents inevitable "line-drawing" issues. Also, a consistently-applied rule will produce different results as factual situations (such as the length of sea voyages) change over the decades. That does not affect the consistency of the rule, or the clarity of its application to overseas employees. In this case, the parties have stipulated that overseas federal employees have only one

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7/ The 1900 census does not present an exception, as appellants claim. The relevant instruction that year required overseas military personnel to be counted at their overseas posts, and not be apportioned back to states. J.S. App. 63a n.26. A domestic rule of enumeration may have allowed some such persons anomalously to be counted for a second time at the residences of their families. Id. Since such double counting is impermissible, this anomaly should not be treated as a knowing departure from practice.

usual residence, which is their home overseas. Stip. 8 (J.A. 174).

The Secretary also suggests that because decisions about the conduct of the census involve determinations as to cost and feasibility, all such decisions must be unreviewable. This argument leads, however, to absurd results. Suppose, for example, that the Secretary had decided in 1990 that it would be too expensive to conduct an actual enumeration at all, and had ordered the Census Bureau simply to use the results of the 1980 census with a statistical adjustment. The result would not be a "decennial census," see 13 U.S.C. § 141, 2 U.S.C. § 2a(a), as anyone has ever understood the term, but according to the Secretary, the decision would be unreviewable by the courts.

Indeed, the Secretary's argument would open the way to the kind of political manipulation of census results that occurred routinely prior to 1790. If, for example, a future Secretary makes a decision in July of the census year about what data to use in that census, as occurred in 1990, he or she will already have the results of the April count and precise computerized information as to the impact of various options on the makeup of Congress and the Electoral College. If that Secretary succumbs to the political temptation to change the rules so as to move seats, and if there were no judicial revew, then it would require a veto-proof majority in both houses of Congress

to avoid serious political abuse. As the Court in Philadelphia v. Klutznick, 503 F. Supp. 663, 675 (E.D. Pa. 1980) noted:

> The census is more than a statistic. It is an essential element in the democratic process. To hold that the agency charged with its tabulation is not subject to judicial review is to hold that the Bureau is free to adopt any numbers, regardless of bias, manipulation, fraud or similarly grave abuse, which is exactly the type of conduct and temptation the Framers wished to avoid by entrusting the census to the federal government. This cannot be.

It is precisely the constitutional basis of the apportionment census and its centrality to the democratic process that makes reviewability by the non-political branch of the government essential.[8/]

The Secretary has suggested that allowing review of the apportionment census would open the floodgates to numerous challeges to minute census details and invite "micromanagement" of the census by the courts. Appellants' Br. at 25-26. This argument ignores the differences between this case, and, for example, a challenge by a local government to its population count. See supra at 2. Moreover, the fact that in all of the cases cited by the Appellants at page 23 of their brief, the courts, after determining the Secretary's actions to be reviewable, upheld the Secretary's exercise of discretion,

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8/ It could be argued that the Secretary's decisions concerning the many non-constitutional censuses and surveys conducted by the Department, see 13 U.S.C. §§ 141(d) et seq., should be unreviewable. That question, however, is not before the Court in this case.

demonstrates that the federal courts fully understand the deference that must be given to the Census Bureau's technical judgments. The availability of judicial review has not, and will not, render the conduct of the census impracticable.

B. The Relevant Statutes Do Not Implicitly Preclude Judicial Review.

The Secretary argues that her report of state population totals, and the President's statement to Congress of the number of representatives to which each state is entitled, are merely arithmetic statements, and thus are not amenable to judicial review. Appellants' Br. at 17, 28. The plaintiffs do not contest that the Secretary carried out the mathematical computations assigned to her. It is the decision of the Secretary to apportion overseas federal employees based on home of record, which created improper census counts, that the plaintiffs challenge in this case. That decision is plainly the type of "agency action" for which the Administrative Procedure Act provides judicial review. 5 U.S.C. §§ 551(4) & (13). The Secretary's decision, moreover, was certainly "final" for purposes of the APA at the time the overseas employees' data was incorporated into the apportionment counts. Abbott Laboratories v. Gardner, 387 U.S. 136, 151 (1967).

Moreover, the Secretary's decision cannot be characterized as an interpretation of the Census Act, or a "legislative"

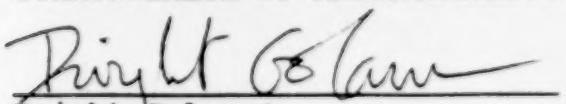
determination, as the appellees attempt to do at page 38 of their brief. To the extent that the Census Act gives the Secretary any authority to "legislate," it would be pursuant to 13 U.S.C § 141(f)(1)'s requirement that the Secretary promulgate rules for the conduct of the Census. But there are no formal regulations on this issue. Stip. 20 (J.A. 178). The only statement similar to a rule was the 1987 Policy Paper by the Census Bureau which stated that it would be arbitrary to apportion overseas employees. Joint App. 211-212. The Secretary's 1990 decision disregarded this "rule." Compare I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 486 n.30 (1987). Contrary to the Secretary's assertion, the decision to apportion overseas employees was a classic "interpretive" decision. See Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). Although achieved through informal procedures, the Secretary's decision is subject to review on the administrative record. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-45 (1985).

V. CONCLUSION.

For these reasons, the district court's decision should be affirmed.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS



Dwight Golann*
Steve Berenson
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2068

*Counsel of Record

John P. Driscoll, Jr.
Edward P. Leibensperger
Neil P. Motenko
Special Assistant Attorneys General
Nutter, McClennen & Fish
One International Place
Boston, Massachusetts 02110
(617) 439-2000

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